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Before The

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter Of Ronald Brasher, Patricia Brasher, and DLB Enterprises, Inc. dba Metroplex Two-Way Radio Service	)	EB Docket No. 00-156

Before: The Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

EXCEPTIONS OF DLB ENTERPRISES, INC.

Submitted September 8, 2003

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Summary/Statement Of The Case/Questions of Law

Statement of the Case: Defendants contend that the Court's Decision is contrary to the dictates of 5 U.S.C. §556(c) and standards of proof articulated in *In the Matter of TeleSTAR, Inc* 2 FCC Rcd. 5, at ¶ 23 (1995) and the burden of proof which the Court properly assigned to the Bureau, yet the Bureau did not meet Rather, the Decision is based on facts contradicted within the record, which contradiction was provided no decisional weight, and the Court's acceptance of total veracity of that testimony provided by opposing witnesses, which veracity is not found in the record evidence. Therefore, based on a preponderance of all evidence contained in the record, the Court could not have reasonably found Defendants culpable. Accordingly, the Decision should be reversed on review.

Questions of Law Presented: The specific questions of law are, for the Commission's convenience and reference, articulated in the titled sections and subsections of the brief. However, the general questions of law are as follows: Whether the Court erred in its finding of improper specific intent in the actions taken by Defendants, absent evidence of Defendants' knowledge that their actions were, perhaps, not in strict accord with the agency's rules; and whether the Court erred in failing to give weight to any material evidence which contradicted the conclusions put forth by the Bureau, and whether the Court erred in holding that the actions taken by Defendants warrant revocation and disqualification. Defendants claim that the Court did so err and that such error is material and subject to the Commission's reversal on review.

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EXCEPTIONS

1. In accord with 47 C.F.R. § 1.276, DLB Enterprises, Inc., dba Metroplex Two-Way Radio Service ("DLB") hereby submits exceptions to those findings published in the Initial Decision of Administrative Law Judge Arthur I. Steinberg, *In the Matter of Ron Brasher, et al.*, EB Docket No. 00-156 (Released August 8, 2003) ("Decision"). The Decision found in favor of the Enforcement Bureau ("Bureau") regarding the issues presented therein and DLB requests, upon review, that the Commission reverse or modify the Decision based on the following, issues of law and fact.[1]

I. Misrepresentations And Lack of Candor: Issue (a): Whether the Court erroneously found that Brasher had engaged in misrepresentation and/or lack of candor before the Commission.

2. The Court concluded that, "[t]he findings of fact establish, and it concluded, that Ron Brasher made multiple misrepresentations of fact to, and concealed material information from, the Commission in applications he filed with the Commission in the names of others." Decision at ¶ 111, and that "Patricia Brasher was complicit in the misrepresentations made by Ron." *Id.* The Parties dispute this finding and request that, upon review, the Commission reverse the Court's conclusion.

(A). Whether The Court Improperly Ignored The Pro Se Status Of The Brashers.

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[1] The Commission's and the Court's standard of review are contained in the introductory ¶¶ 2-4 in Ron Brasher's Exceptions filed in this matter, which proposed standards are incorporated herein.

3. By ignoring the *pro se* status of the Brashers during all times relevant, the Court did not determine whether the Brashers' lack of knowledge undermines the necessary finding of specific intent to deceive, thus, the Court erred. A fuller recitation of this issue is contained at Section I(A) of the Exceptions of Ron Brasher filed in this matter which recitation is incorporated herein.

(B). Whether the Court erred in its finding that Defendants' motive in filing the subject applications evinces an intent to deceive.

4. The Court's equation of motive with intent, without examining the issue of knowledge regarding the alleged wrongdoing, is clearly error. A fuller recitation of this issue is contained at Section I(B) of the Exceptions of Ron Brasher filed in this matter which recitation is incorporated herein.

(C). Whether the Court erred in finding that the Defendants engaged in misrepresentation in their use of the Sumpters'as licensees.

5. The Court's decision rests on its finding that the Sumpter testimony was entirely accurate and believable, however, this finding is at odds with the record evidence and thus, is in clear error. A fuller recitation of the issues regarding this matter are contained at Section I(C) of Patricia Brasher's Exceptions filed in this matter, which recitation is incorporated herein.

(D). Whether the Court erred in its finding that the Brashers' use of O.C. Brasher's name was a misrepresentation or evinced a lack of candor.

6. The Court failed to find evidence of intent to deceive the Commission regarding the use of O.C. Brasher's name and, thus, the Court's finding was in error. A fuller recitation of this issue is contained at Section I(D) of the Exceptions of Ron Brasher filed in this matter which recitation is incorporated herein.

(E). Whether the Court erred in finding that the Defendants' actions related to the Ruth Bearden license warrant disqualification.

7. The Court's treatment of this issue does not take into proper consideration Ron Brasher's effort to mitigate any harm upon the processes of the Commission. A fuller recitation of this

issue is contained at Section I(E) of the Exceptions of Ron Brasher filed in this matter which recitation is incorporated herein.

(F). Whether the Court erred in its finding that the Defendants misrepresented facts in their Opposition to the Net Wave Petition.

8. The Bureau claimed, and the Court found, that the Brashers misrepresented facts in the Opposition filed in response to the Net Wave Petition. This conclusion is unsupported by the record and a plain reading of the Opposition which does not assert facts, *per se*, but challenges the procedural basis for the filing of the Net Wave petition. However, the Court's finding stands on Bureau inferences drawn under the least favorable light to the Brashers and excludes that evidence which fully contradicts the conclusion.

9. The Bureau's first inference is drawn from its allegation that the Sumpters did not subscribe to the filing of the Opposition. However, Jim Sumpter testified that, before the Opposition was filed, "[he] read it, but not line by line."(Tr. 1850) Jim did not ask any questions about the Opposition.(Tr. 1851) Jim did not care how [Ron] took care of the allegations raised in the Net Wave Petition, as long as [Ron] took care of addressing those allegations, and "if the Opposition would take care of it, [Jim] was just as happy to have [Ron] do it and file it. "(Tr. 1854) Jim just "wanted it done."(Tr. 1854-55) Jim's testimony therefore evidences that Jim authorized and subscribed to the filing of the Opposition in his name and on his behalf. It is outrageous for the Bureau to claim, and the Court to find, otherwise. And given that Jennifer and Melissa have followed Jim's advice on everything he has instructed them on with regard to the Bureau's investigation, it can be logically inferred that they too authorized and subscribed to the filing of the Opposition on their behalf.(Tr. 1966-67) What is most significant is that the Brashers logically and reasonably concluded that their efforts in filing the Opposition were with the

consent of the Sumpters and that the Sumpters had knowledge of the content of the Opposition. Thus, the Bureau's claim on this point and the Decision's reliance upon any inference of misrepresentation arising from the Bureau's claim is in obvious error.

10. It is true that the Opposition states that the Sumpters (as well as the other operators) retained control of their own stations, and further, that all stations are managed by DLB. In the eyes of the Brashers, this was a true and correct statement. The Brashers did not employ the elements of *Intermountain* in making their statement and did not even know of the case's existence or what relevance it might have on their statement. Rather, the Brashers responded based on their common knowledge and belief. Any other inference drawn by the Court is without any recognition of the manner by which persons normally respond. This stated, the record reflects that the Brashers believed that the Sumpters retained ultimate control in their licensed facilities, and this belief is evidenced by the fact that when Ron was directed by Norma to turn off her station and Melissa's station, Ron did just that.(Tr. 537-538) There can be no better indicia of a licensee's control of a facility then their ability to cause the station to go dark. Accordingly, the Brashers reasonably believed that the Sumpters exercised control over their licensed facilites.

(G). The Court erred in its finding that the Brashers misrepresented facts regarding the Sumpters's applications and licenses during the investigation and hearing on this matter.

11. As demonstrated fully at Section I(C) of Pat Brasher's Exceptions, the Court's finding that the Sumpter testimony was "forthright, candid, and entirely believable," Decision at ¶148, serves as the basis for the Court's conclusion that the Brashers' testimony contained misrepresentations. However, the Sumpters' testimony was not entitled to the Court's awarding of complete credibility. It is inconsistent, contradictory, and without any cognizable factual support. In fact,

the Decision suggests that the Court's predilection toward believing the Sumpters is based on little more than a photocopy of a single date on a client copy, see, Patrica Brasher's Exceptions at ¶¶ 38-39. Having swallowed whole every scrap of testimony given by the Sumpters, regardless of whether the testimony cannot withstand logical scrutiny, the Court backed itself into a position of having to find that the Brashers' testimony was false. Interestingly, the Court's only basis for finding that the Brasher testimony was false is the Sumpter testimony. It had no other cognizable basis for that conclusion. Thus, if the Commission correctly concludes on review that the Sumpter testimony does not withstand scrutiny in all respects, the Court's conclusion regarding the Brasher's participation in the investigation and hearing is subject to reversal.

12. The Brashers' testimony, as contrasted with the Sumpters, is consistent and supported by documentary evidence which supports their statements. However, of even greater importance, the Bureau could only peek at the threshold of proof that it had the burden to show, standing fully on the shoulders of the Sumpter testimony. If the Sumpters falter, the conclusion of misrepresentation following the commencement of the agency's investigation fails entirely, and the Court's decision must be reversed.

13. Section I(C) of Patricia Brasher's Exceptions sets out dozens of errors, omissions, inconsistencies, and bald assertions made by the Sumpters which cannot be confirmed or logically believed. Said simply, the Sumpters' reflection of the facts simply does not hold water, despite their failed attempts to be fully consistent via their closed meetings to confer again and again regarding the nature and extent of their testimony. Thus, the Bureau failed to meet its burden of proof to show that the Brashers' participation in the Bureau's investigation or their testimony at trial contained any misrepresentations.

14. That the Court was purely fishing for misrepresentations is shown by what is one of the more bizarre elements of the Decision at ¶ 141. The Court makes much of the expression "initial meeting" and contrasts it with other testimony that suggests that a "series of meetings" took place. This "gotcha" is unworthy of inclusion in the record as the subject testimony was not material and the off-hand expressions or lack of precise erudition of the Brashers is not proof of misrepresentation. Persons remember and express events in differing manners, sometimes providing immaterial miscommunication along with the way. But for a statement to arise to the level of proof of a misrepresentation, the subject statement has to be shown to false, material, and evincing an intent to deceive the Commission. Even if the recitation of the subject meetings differed to some degree, that difference does not support a finding of misrepresentation. Had the Court spent only some small percentage of its efforts reviewing more closely the testimony of the Sumpters, employing the same litmus test as it applied to the Brashers, it would have noted the long list of the Sumpters' "misrepresentations" in its Decision, concluding that Sumpters' testimony is so suspect as to fully undermine the Bureau's case against the Defendants. That the Court did not apply the same level of scrutiny to all of the testimony is apparent. That the Court did not properly apply equal scrutiny also results in an improper shifting of the burden of proof from the Bureau to the Brashers, and this is reversal error.

(H). Whether the Court erred in finding that Defendants had engaged in misrepresentation or lack of candor in the investigation and hearing related to the license issued in the name of O.C. Brasher.

15. The Court erred by failing to base its finding on record evidence which fully contradicts the findings with the Decision. A fuller recitation of this issue is contained at Section I(H) of the Exceptions of Ron Brasher filed in this matter which recitation is incorporated herein.

(I). Whether the Court erred in finding that the Defendants lacked candor in their participation with the Bureau's investigation and the hearing.

16. DLB avers that when the Court found that the Defendants lacked candor, as a result of the Court's finding of misrepresentation by the Brashers, those findings must each fail for those reasons expressed above. Since there exists no record evidence which supports any finding that the Parties engaged in misrepresentation in their participation in the Commission's investigation and at hearing, the remaining element candor, requires separate treatment. Although the Court found that the Brashers engaged in misrepresentations based on the Court's acceptance as believable the totality of the Sumpters' testimony, the Commission will find on review that the Court's finding of lack of candor is usually a simple an add-on to misrepresentation, and that the Court rarely treats the issues separately. When such is done, those findings are successfully challenged by Defendants.

17. At all times relevant, the Defendants have been more than forthcoming in responding to Commission inquiries. When asked, the Brashers answered fully and completely, putting forth costly and painstaking efforts to provide thousands of documents for the Commission's review. The Brashers masked nothing. The Brashers, after discovering that they were indeed in violation of certain rules and regulations, did nothing to thwart the Bureau's investigation. The Brashers fully admitted in their responses that DLB was operating the subject stations in a trunked manner that apparently violated the Commission's rules–this trunked operation being one of the primary issues presented in the Net Wave Petition and subsequent Bureau inquiry. (EB Ex 7, pg. 7) Nor did the Brashers hide the fact the some of the subject stations were being managed without a written agreement, although such activity is also held in strict disfavor by the Bureau.(EB Ex. 17, pg. 2) Therefore, the Brashers' admissions serve as evidence of candor, not lack of candor.

18. That the Defendants did not lack candor is fully demonstrated by the record. Nearly all evidence employed by the Bureau in its case, excepting Bureau Ex. 50, was supplied to the Bureau by the Parties. On one hand the Bureau relied nearly exclusively on the documents and responses provided by the Brashers, including those documents and responses which revealed violations of the Commission's Rules. Yet, the Bureau contended and the Court found that those same documents revealed a lack of cooperation and candor in the Bureau's investigation. The Parties are at a loss in explaining how a defendant can give the Bureau its alleged case via thousands of pages of documentary evidence and associated admissions, and still be found to be uncooperative and lacking candor.

19. Finally, the Court's finding of lack of candor at the hearing is fully belied by the record. Lack of candor is grounded in a party's withholding of material facts or failing to respond to direct inquiry. DLB respectfully directs the Commission to the record testimony of Ron Brasher upon which the Court relies in making its ruling. During days of testimony, Ron Brasher was asked approximately 2,637 questions. To those questions he answered "I don't know" to 56; "I don't remember" to 12; and "I don't recall" to 2. Therefore, he failed to answer or provide substantive testimony to only 2.7% of the questions asked. This remarkable effort does not support a finding that Ron Brasher was attempting to hide anything. To the contrary, Ron Brasher's testimony demonstrates fully that he was attempting to hide nothing, trying his best to answer every single question asked, in full.

II Real Party-in-Interest/Unauthorized Transfer of Control/Abuse of Process: Issues (b) and (c): Whether the Court erred in finding that the Defendants abused the Commission's Processes via violations of the real party-in-interest standards and rules against unauthorized transfers of control.

20. As a first matter within this generally expressed issue by the Court, the DLB avers that the

Court decided in clear error when it found at paragraph 154 of the Decision, "unauthorized transfer of control, real party-in-interest, and abuse of process are inextricably intertwined [and] they will be considered together." The Court's statement provides to it a convenient short-cut in its efforts to decide the complex matters before it, but its ruling is fully in error. An entity may negligently cause a transfer of control to occur by failing to file the proper application with the Commission when equitable ownership of the license shifts to a new party via sale of shares of stock. Upon death or settlement of an estate or bankruptcy, the real party-in-interest can change overnight, prior to any notification or request for assignment or transfer of a license. Either transfer of control or a change in real party-in-interest can occur without specific intent to abuse the Commission's processes or deceive the agency for any purpose. It is notable that the Court provides no case law in support of its sweeping statement. In fact, none can be found.

21. How much the Court's stated belief, that these three issues are interdependent or may be found to exist as a grouping of issues for the Court's convenience, has adversely affected the Court's ruling is obvious. For if the Court had focused solely on the issue of abuse of process, applying the relevant law in this area, it could not have found that the Defendants abused the Commission's processes, *see*, Section II (A) below. And if the Court had properly dealt with this single issue, rather than bunching it together with the others, would the Court have found that the Brashers should be subject to disqualification? The Commission is left to wonder and, therefore, upon review the Commission should find that the Court erred in the first instance in its treatment of these issues and reverse the Decision.

(A). Whether the Court erred in finding that Defendants had engaged in abuse of the Commission's processes.

22. For the Court to have found properly that the Defendants had abused the Commission's

processes, the Court would need to reasonably conclude that the Parties had used a Commission process to achieve a result that the process was not intended to produce or use of that process to subvert the purpose that the process was intended to achieve.[2] Like a claim of misrepresentation, a finding of abuse of process hinges on the intentions of the defendant, [3] i.e. the Court must have found that the Bureau proved that the Brashers had a specific intent to abuse the Commission's processes.

23. Additionally, the focus is on whether a defendant abused the Commission's processes to achieve a result to which the defendant would not otherwise be entitled. No abuse of process was found where it was also found that the Bureau presented no evidence or other showing that the licensee was ineligible to hold the license in question. *In the Matter of James A Kay, Jr* , WT Docket No. 94-147, FCC 99D-04, 10 FCC Rcd. 2061, ¶ 205 (released Sept. 10, 1999) (hereinafter, "*James A. Kay, Jr.*"). Accordingly, if the Parties were otherwise eligible to hold the subject licenses, then abuse of the Commission's processes cannot simultaneously be found.

24. It is unquestioned that the Brashers acted without legal counsel in the preparation and filing of the subject applications. It is further unrebutted that the Brashers were seeking a lawful means to obtain additional channels in view of then-newly revealed licensing challenges presented by

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[2] *Broadcast Renewal Applicants*, 3 FCC Rcd. 5179, 5199 n. 2 (1988).

[3] A conclusion that an entity abused the Commission's processes requires a "specific finding, supported by the record, of abusive intent". *Evansville Skywave, Inc.*, 7 FCC Rcd. 1699, 1702 n. 10 (1992); *see, also, Eunice Wilder*, 4 FCC Rcd. 5310, ¶ 251 (1989) with regard to required disclosures in the application process, only intentional non-disclosures will support a finding of abuse of process.

Section 90.313(c).[4] It is also shown upon the record that the Brashers relied on advice given by Scott Fennel of PCIA and John Black in the preparation of the subject applications, and that the Brashers did not devise their licensing method independent of this advice. It is further uncontested that the Brashers looked at the licensing techniques employed by other licensees in the Dallas area and concluded that the advice given by Fennel and Black was evident in the licensing of other carriers' systems.(Tr. 587-88, 649-50) Therefore, this record evidence demonstrates that the Brashers did not evince an abusive intent in their preparation of the subject applications. Rather, the Brashers were following the advice of John Black and Mr. Fennel, whom the Brashers reasonably believed were advising them in obtaining the channels *without* violation of the Commission's Rules.(Tr. 587-88, 649-50) No other conclusion is possible and the Court erred in its contrary finding.

25. The Court also did not consider the fact that DLB was fully entitled to hold the subject licenses in its own name. Although the method chosen by the Brashers pursuant to Black's and Fennel's advice was absurd given the availability of easier, more straightforward methods of licensing, the fact remains that DLB was fully eligible to hold each of the subject licenses in its own name, thus abuse cannot be found to have occurred.

26. The subject rule with which the Brashers, Black and Fennel struggled is 47 C.F.R. §

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[4] The testimony given at trial reveals that some interpretation of the Commission's rules, which interpretation has not been offered by the Bureau or any of the witnesses, precluded the Brashers from immediately duplicating that licensing method which resulted in a five-channel grant for station WIL990 on 5/28/96. The only explanation provided at trial relates to 47 C.F.R. §90.313 and the supposed obligations on applicants arising out of an unpublished interpretation of that rule that was made effective by the internal policies of PCIA in mid-1996. (Tr. 2259-65) Further testimony demonstrated that both John Black and PCIA's representative, Scott Fennell, assisted in trying to explain that interpretation to Ron Brasher, further suggesting the possible method for complying with that rule section via the use of managed facilities. (Tr. 585-89, 1643)

90.313. Taken together, the subsections of Section 90.313 require that a licensee show that a channel is fully loaded prior to requesting additional channels. In essence, the rule is intended to prevent spectrum warehousing. The rule is designed to assure that an applicant only applies for the number of channels required to meet the needs of demand. Yet, despite the obvious intention of the rule, to assure that spectrum is used to serve the public and not be hoarded while lying fallow, it is curious to note that this intention was not thwarted by or even alleged to have been violated in any manner by the Defendants. To the contrary, the premise of the Court's finding is that the Defendants abused the Commission's processes by a means which resulted in a condition that the rule was specifically attempting to achieve. All of the subject channels were constructed, fully loaded, and provided service.[5] Therefore, the clear intention of the rule was fully served by the Defendants.

27. *If provided advice from competent telecommunications* counsel rather than informal advisors, DLB could have employed one of at least two other paths for licensing the channels in DLB's name. Either DLB could have requested a waiver of Section 90.313, to which DLB would have been fully entitled. Or DLB could have filed successive applications, one following the other, until all of the necessary channels were granted based on the immediate loading of the 700 mobile units. More specfically, DLB could have constructed all seven channels, and programmed all of the mobile units to operate on each of the channels. The repeaters would not be activated, i.e. placed in service, until grant. If the seven applications arrived in order at the

[5] In fact, the channels immediately provided service to over 700 mobile units (Tr. 79), a loading level sufficient to justify a number of channels equal to all of the channels licensed to the Sumpters, O.C. Brasher, Ms. Lutz, et al. That this loading was immediately achieved is part of the Court's finding and the record.

Commission, each successive application would be fully supported by the grant and activation, with full loading, of the prior granted application. Thus, grant-activation-loading, grant-activation-loading, etc. would have occurred lawfully over a short period. Admittedly, this method, albeit entirely consistent with the rule, is cumbersome and silly, it demonstrates that DLB was fully eligible to hold the subject licenses in its name, while simultaneously comporting with the subject rule. Despite whether DLB chose to request a waiver of the rule, to which it was entirely eligible, or file seven successive applications, for which the record shows that grant would have been wholly appropriate, the conclusion which the Commission must find upon review is that DLB and/or the Brashers were fully eligible to hold the subject licenses and, thus, no abuse of the Commission's processes might be found.

28. This conclusion is consistent with the case law which clearly states that abuse of the Commission's processes will not hold when the actions taken by party do not violate the intent of the Commission's rules and which result in the grant of a benefit for which the entity would have otherwise been fully eligible. The clear intent of the subject rule is to prevent spectrum warehousing and to assure that the T-band channels are constructed, made operational, and are fully used to provide communications service to the public. The testimony and associated evidence is entirely clear that the subject channels were acquired to serve the public, were used to serve the public, and have been employed at loading levels which are fully consistent with the criteria set forth in Section 90.313. (Tr. 79, 553-55) The claim of spectrum warehousing is conspicuously missing in the Decision. What the testimony and evidence fully show is that the Defendants employed the channels in the exact manner contemplated by the Commission. Accordingly, Commission should find as a matter of law that the Defendants did not intend to

nor engaged in abuse of the Commission's processes.

29. Similarly, the Commission must find, upon review, that Ron Brasher was entitled to file an application on behalf of O.C. Brasher. Although the Decision fails to recognize that an executor of an estate is entitled to hold a Commission license, the Commission will have no difficulty confirming this eligibility, including the eligibility of: "an individual, partnership, association, joint stock company, trust or corporation." 47 U.S.C.§ 332 and 47 C.F.R. § 90.7. If there exists no bar to an estate holding a license, there is similarly no bar to an executor applying for a license. The Court erred in its decision by failing to even explore this element in its finding of abuse. For if, as the record shows, Ron Brasher believed that O.C.'s estate was eligible to apply for and hold a license, then the application executed by Ron on behalf of O.C. cannot be found, standing alone, to evince any intent to abuse the Commission's processes.

30. If Ron Brasher had explored the Commission's Rules, the only language he would find would support his eligibiity as "such person or entity legally qualified to succeed to the foregoing interests under the laws of the place having jurisdiction over the estate involved." 47 C.F.R. § 1.948(g). The quoted rule makes it clear that the Commission's rules permit executors to hold licenses, and in the absence of any statement to the contrary, it is equally clear that an executor is entitled to file applications on behalf of an estate. Therefore, an executor of an estate is entitled to apply for a license in his representative capacity so long as the executor is legally qualified to succeed to the decedent's interests under the laws of the state having jurisdiction over the estate. In the case at bar, Ron was entitled to apply for a license on behalf of his father's estate so long as he is deemed to be qualified to succeed to O.C.'s interests under Texas law. The burden of proof remained on the Bureau to demonstrate that Ron did not possess this qualification and, to

meet the burden of specific intent to abuse the Commission's processes, that Ron *knew* that he possessed no such qualification, and that he sought to deceive the Commission regarding his qualifications. The Bureau introduced no evidence on this matter and the only record evidence upon which the Court could rely is the testimony of Ron Brasher in which he stated that he believed he was entitled to act on behalf of O.C.'s estate, see, Ron Brasher's Exceptions at ¶ 24.

31. Had the Bureau or the Court properly probed the Texas probate statutes it would have been shown that a decedent's estate can be probated up to four years after the decedent's death. *See, Tex Probate Code Ann. § 74 (West 2001)* In accord with Texas law, "all applications for administration upon an estate must be filed within *four* years after the death of the testator or intestate." *Id.* (emphasis added). As it is clearly contemplated under Texas law that the administration of an estate need not be instituted immediately upon expiration of the decedent, or even within a few years thereafter, it logically follows that a party managing the affairs of the decedent in the interim period between the decedent's death and the institution of the administration of the estate is acting as a *de facto* executor until such time as an application for administration of the estate is formally filed. Therefore, the fact that Ron acted on behalf of his father's estate prior to filing for administration of the estate does not support the conclusion that Ron was not entitled to take such action on behalf of his father's estate, particularly in view of the fact that Ron was relying on the language of his father's will, naming him executor.

32. It is not contended that a properly filed application need not have indicated that Ron Brasher was filing the application in his capacity as executor of his father's estate. Rather, it is noted that the Bureau failed to address, and the Court failed to consider, the issue of whether Ron's entry of O.C.'s name on the application was a simple error regarding how to title the

license for the estate, or was an attempt to mislead the Commission. As shown at Section I(D) of Ron Brasher's Exceptions, Ron's use of his father's estate was not and cannot be shown to be a misrepresentation, thus no necessary finding of intent to deceive the Commission is possible. Since Ron's belief is reasonable and in accord with law, no finding of abuse is possible.

33. As shown above, abuse of process cannot be found under the particular circumstances of this matter and application of relevant case law and rule. Thus, insofar as the Court has improperly attempted to consider together the issues of abuse of process/real party-in-interest/transfer of control, the Commission should, on review, separate these issues in its consideration and reverse the Court's "bootstrapped" conclusions.

(B). The Court erred in finding that an unauthorized transfer of control or violation of the real party-in-interest rules had occurred which support disqualification.

34. Commission precedent states that this issue is one that will be determined on a case-by-case basis,[6] noting that the unique nature of business and, as here, familial relationships can often blur the lines between licensee, operator, manager, and employee. The need to examine carefully each situation is particularly valid when the subject stations are operated by some combination between licensee and the party to whom control is deemed transferred.[7]

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[6] Whether transfer of control has occurred is a matter of interpretation of unique facts regarding a specific license, not a codified formula. Ergo, those facts are relevant to individual cases and the facts presented therein; *Fox Television Stations,* at ¶154 "[d]etermining de facto control is more complex for it involves an issue of fact which must be resolved by the special circumstances presented. Case by case rulings are therefore required."

[7] Stations are often financed, serviced, supplied and operated by contractors, managers, cooperative associations, joint venturers, manufacturers and service companies, on behalf of licensees.

35. Both the Bureau in its HDO and the Court rely on an old case, *Intermountain*,[8] in which the decision set forth indicia of control of a common carrier station. However, the Court's reliance upon this 40-year-old case is misplaced and nothing within the Decision reflects the Commission's efforts to create secondary markets of spectrum, whereby the old idea of strict licensee control of all aspects of operation have been modified and are subject to further modification. Stated simply, the regulatory thrust of the Commission has changed since 1963 when *Intermountain* was published.

36. *Intermountain* preceded disaggregation and partitioning and management contracts accepted as a lawful means to share the fruits of licensing among a broader range of businesses. There is no way that one could reconcile the language of *Intermountain* with the creation of 700 Guardband Managers. The obvious conclusion is, therefore, that the law has moved and evolved beyond the suggested strict application of the tests put forth in *Intermountain.*

37. The above considered, *Intermountain* itself held that the six indicia of control suggested therein were only instructive for the purpose of determining control of a licensed facility. The case is, at best, illustrative, not draconian in its meaning and intent.

38. Nor could the Court presume that a *pro se* actor had reviewed the contents of *Intermountain* prior to acting, or studied the case law arising out of the Commission's application of 47 U.S.C. § 310(d). Had the Defendants sought legal counsel earlier in the process, this matter would not be before the Commission and the hearing would not have taken place in the first instance, for DLB would have held authority for each of the subject channels in Allen, Texas, employing

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[8] *Applications of Microwave Transfers to Teleprompter Approved with Warning*, 12 F.C.C. 2d 559 (1963), (Public Notice), (*i.e.* Intermountain Microwave Standard).

rather simple licensing processes of the Commission.

39. Finally, as a preliminary consideration to the issue of control, the Commission may note that *Intermountain* did not attempt to deal with the situation where the relevant parties are family members. This area of the law is filled with unique circumstances, specialized treatment, and differing conclusions than might be decided if the relevant parties were unrelated entities. Therefore, the Court's failure to consider the status of the parties and their close family relationship is reversable error. It was incumbent upon the Court to apply the law in a manner which takes into account all material, relevant circumstances.

40. The Commission, upon review, will find that the uncontested record evidence shows that the Brashers were ignorant of many areas of the law related to third party licensees. Accordingly, the Brashers employed a licensing method which was silly. They also employed a method, which predates *Intermountain*, for choosing those persons who would stand as licensees, and upon whom they might rely for future, expected harmonious, business dealings. They chose family members. This choice is not unusual, unexpected, and given other circumstances, might be considered quite noble.

41. The family members chosen had knowledge of DLB's business and contributed, in various fashions, to the success of the overall enterprise. Jim Sumpter obviously had intimate knowledge of DLB's business and, in fact, created the accounting method that guided Pat in commencing and continuing the operations.(Tr. 1870-71) Norma went shopping with Pat each Saturday and they discussed DLB's business with great regularity.(Tr. 1073) Norma also participated in the accounting function in her role as Jim's assistant, including writing checks for FCC filing fees on Jim's business account.(Tr. 376, 1990, 2118, EB. Ex. 42 at 2) O.C. Brasher

lived with Ron and Pat and was also fully aware of the efforts of the business. (Tr. 804) Jennifer was studying to become a CPA and worked on DLB's accounts in Jim's office – again gaining knowledge of DLB's operation.(EB. Ex 19, Tr. 810-11) And Melissa was, like the others, around for those discussions about what DLB was doing and where it might go. (Tr. 344, 396) Carolyn Lutz actually worked for DLB and assisted in the preparation of the applications to the FCC.(Tr. 777, 832, 1132, 1150, 1230) The record evidence shows that among the aforementioned parties, Jim, Norma, Melissa, and Jennifer all claim to have executed applications for FCC licenses, and Jim and Norma both held licenses prior to 1996. (Tr. 390, 347-8, 540, 1119, 1315, 2124, EB Ex. 42 at 2)

42. The family members not only possessed various degrees of knowledge regarding DLB's business, but each of the family members also possessed knowledge regarding the potential value of spectrum, i.e. licenses. An earlier sale of 800 MHz channels by DLB had amply demonstrated to each of the family members that the status of being a Commission licensee could, under the right circumstances, be quite beneficial.(Tr. 1891, 2200, 567, 399) The uncontroverted facts of the matter demonstrate that family trusted family to contribute to the overall benefit of the family in expanding DLB's business. Like shares of stock distributed among family members, the Brashers sought to distribute licenses among family members who understood to some degree the nature of the business and FCC licensing and whom they believed they could trust in future dealings.

43. Although the Court's ruling attempts to make much of the financial aspects of the licensing and operation of the subject stations, *see*, Decision at ¶¶162-165, and indeed the analysis would have some credence if applied to normal business entities, the Defendants' financing of

operations is neither unusual, nor unexpected, in a family setting. It is apparent that all participants knew that the channels were intended to promote the family business, DLB. It is also apparent that all family members intended to benefit from this promotion. In essence, what was good for the family business would reap benefits for all of the participants in licensing. By contributing each's licensing assistance, Carolyn Lutz's financial prospects would be improved through her employment with DLB, Jim and Norma Sumpter would obtain greater financial rewards through greater demand for accounting services, O.C. Brasher's benefit via his original application would be a direct result of any improved financial condition in Ron and Pat, since he lived in their home. As Jim and Norma prospered, so too would their children, Jennifer and Melissa. Under the circumstances, the intended benefits of increasing DLB's revenues would have a positive effect that would be felt by all participants. The intrafamily effects of the new channels and the revenues which might be derived motivated all of the participants.

44. That the Brashers or DLB paid for licensing or repeaters or rents is deemed significant by the Court for demonstrating some form of improper intent. However, only the Brashers among the family members could afford these costs. That they paid these costs, either directly or via DLB, is then not evidence of improper activity, but rather a natural outcome of the family and the members' respective resources. If the family had, instead, fully incorporated all of its members via a distribution of stock, the source of the funds of operation would still have been DLB or the Brashers. The Brashers would still have been the source of investment capital. Under that scenario, the Commission would have no interest in this matter. However, since an unsophisticated group of family members chose a different method for accomplishing equal goals, the Court would subscribe an improper intent. This is illustrative of the fact that

application of *Intermountain* is completely forced and problematic when applied to family situations. As the testimony shows, DLB did not even have named members to a board of directors.(Tr. 619-20) The family didn't know that it was necessary or required. (Tr. 619-20)

45. The Brashers have averred that during all times relevant *de facto* control of the subject licenses was held by the family and that such control never transferred, until such time as this matter fractured involuntarily the family unit. No other logical interpretation exists based on the totality of the evidence. This obvious conclusion is only rebutted by the forced application of *Intermountain*, which application is improper given the facts and circumstances of this matter. That the family exercised *de facto* control and that no one member or shareholder in DLB exercised all of that control suggested by *Intermountain*, is clearly held forth in the record. DLB ran the facilities and billed the customers, yet the Brashers financed the purchase of the repeater equipment and paid the site rental. Jim Sumpter made all decisions regarding the finances of the business, including the payment of taxes and treatment of employee benefits. In fact, DLB was Jim Sumpter's biggest customer for years, providing the bulk of his income. Norma assisted Jim and Jennifer also worked on the accounts. (EB Ex. 19) Carolyn Lutz was an employee of DLB and volunteered to assist in the licensing of additional channels.[9] (Tr. 777, 1132, 1158) Together, the various family members fell naturally into their roles, based on their efforts, education, experience and knowledge, that forwarded the overall enterprise.

46. The shared enterprise worked well and harmoniously for all related persons, until the Net Wave petition hit. The arrival of the Net Wave petition created fear in the Sumpters. Formerly close family members became concerned about their livelihoods, professional standing, and even

[9] Three other family members also served, at various times, as employees of DLB.

wondered if they might be subject to criminal prosecution and jail.(Tr. 969, 1099, 1101, 1103, 1366-68, 2201) Instead of the cooperation that each had enjoyed with each other, suddenly persons struck defensive postures, even if that meant the Sumpters had to join together to concoct a story that would result in the Brashers being pilloried before the agency. What was a close family unit became chaotic, fearful, recriminating, and panicked, resulting in personal betrayals and false accusations to fortify the bunkers of the various camps against Commission scrutiny. Nothing is clearer on the record than the reactions to the Net Wave petitions and the adverse effect that it had on the family unit.

47. Yet, even before the Net Wave petition arrived, it is apparent that the Brashers did not exercise the absolute control over the facilities that the Court found. Most telling is the fact that Norma had previously requested that the T-band facility licensed in her name and the T-band facility licensed in Melissa's name, be shut off. (Tr. 537-38) The record shows that this demand was satisfied by the Brashers.[10] By this material action, the Brashers demonstrated in the clearest manner possible that the Sumpters exercised ultimate control in their licenses and associated facilities. *Intermountain* does not reach this kind of control. That case assumes operational facilities and that the controlling entity would allow for continued operations. Elements of unfettered control, access, policy decisions, etc., pale in comparison to the most important indicia of control – the ability to shut off the facility and cause it to remain dark with only a phone call. If, as the Court errantly concluded, the Brashers were managing the stations for no one but themselves, *see*, Decision at ¶166, why would have the Brashers acquiesced to Norma's request?

[10] Although Melissa stated that she did not make such a request, the record evidence shows no rebuttal from Norma regarding this request and, thus, it stands uncontroverted.

In fact, they would not. That the Court did not discuss this material, telling fact in its analysis of control within paragraphs 153-167 of its Decision, is reflective of the Court's improperly selective use of the record.

48. Further, in its improper marrying of the unproven allegations of misrepresentation and abuse of process, the Court moves itself unilaterally toward the, then inevitable, conclusion that an unauthorized transfer of control or real party-in-interest problem existed which arose out of an undefined and unsupported contention that the Defendants had engaged in deceptive practices. No where within the Court's analysis of the issue of control did the Court consider that all subject applications and licenses demonstrated commonality of control on their face, *see*, Ron Brasher's Exceptions at ftn. 4. This true and uncontroverted fact flies squarely in the face of the Court's repeated conclusion of deception at every turn. What this obvious and continuously reported commonality demonstrates clearly is that despite the questionable method of licensing employed by the Parties, there can be no finding that an intent to deceive the Commission was present. For one cannot hide from the licensing Bureau what one places in plain view.

49. DLB respectfully requests that, upon review, the Commission look to the specific facts and circumstances of this matter and apply an appropriate view of the Commission's treatment of family matters to the Defendants' licensing, taking into account the unsophisticated nature of the Brashers. Upon review, the Commission will find that the illustrative elements of *Intermountain* simply do not work in defining the control of the subject licenses. The Commission will further find that for all of the administrative errors and misunderstandings of the Brashers during the time when they were acting *pro se*, based on advice from third parties and their pedestrian methods of confirmation by examining the licensing of other radio systems, the Brashers never

evidenced an improper motive in their actions, i.e. an intent to deceive the Commission. Absent any showing of this specific intent, of which there is none except via factually unsupported inferences which are belied by the record, the Court could not have properly concluded that the Brashers should be subject to disqualification.

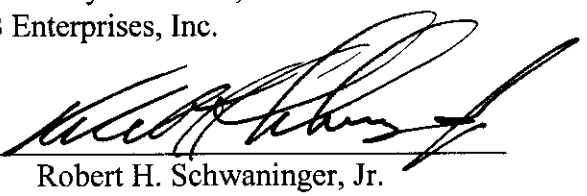
III. Whether the Court erred in its disqualification of the Brashers and DLB.

48. The record evidence and applicable legal standards do not support disqualification. A fuller recitation of this issue is contained at Section III of the Exceptions of Ron Brasher filed in this matter which recitation is incorporated herein

Conclusion

50. For the reasons shown herein and for good cause shown, DLB respectfully request that the Court's Decision be reversed on review or modified to allow the Parties to pay a forfeiture commensurate with factually supported findings of fact and conclusions of law.

Respectfully submitted,
DLB Enterprises, Inc.

By 

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Dated: September 8, 2003

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a copy of the foregoing Exceptions was served by hand delivery/courier to the below listed parties on this 8th day September, 2003.

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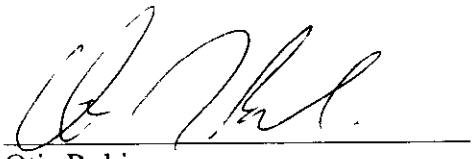

Otis Robinson